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INTRODUCTION

One does not have to dig very deeply into the literature of American constitutional law to suspect that many constitutional provisions do not mean today what their framers thought they meant.[1] This mutability of constitutional norms is not surprising; the document is nearly two centuries old, has few formal amendments, and was framed in a different social and political age. The Constitution has remained vital largely because its provisions have proved adaptable to the changing needs of a developing society. It does not mean what it always meant.[2] But this phenomenon of constitutional change raises a number of perplexing questions. How can the Constitution change when the text and the intentions of its framers remain static? What are the methods of constitutional change short of formal amendment? When and how should such change occur?

This Article attempts to develop an account of constitutional change that addresses these questions. It presents our Constitution as a text-based institutional practice. It thus is opposed to theories, like the "historical approach,"[3] which see the Constitution simply as an original text together

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1. For discussion of specific areas of constitutional growth, see Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975).

2. As used in this Article the word "meaning" does not, save in a few places where the context so indicates, refer to the sense that a word, phrase or sentence bears in a given language ("language meaning"). Nor is it identical with the intention with which a word, phrase or sentence is uttered by a particular speaker on a particular occasion ("utterance meaning"). The meaning of the Constitution and its clauses is indeed related to utterance meaning, but differs from it in at least two ways. First, their meaning is initially the product, not of a single speaker at a single time, but of a complex of intentions on the part of framers, ratifiers, and perhaps others at different times. Second, while it is often maintained that utterance meaning cannot change, the meaning of the Constitution and its clauses, in our view, is susceptible of being amplified and altered by later authoritative interpretations. The best vehicle for analyzing constitutional meaning as just explained may be one of the speech, act or intentional theories of meaning current among analytic philosophers of language. *See, e.g.*, J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); S. SCHIFFER, MEANING (1972); J. SEARLE, SPEECH ACTS (1969). But we know of no such theory which has been developed to accommodate constitutional meaning, nor are we simply borrowing notions that every philosopher of language would accept. Part II of this Article offers an extended, though still informal and imprecise, account of constitutional meaning and how it can change. A formal and rigorous theory cannot be attempted here.

3. *See* text accompanying notes 5-15 *infra*.

with an accretion of historically correct interpretations, and to theories, like Karl Llewellyn's,[4] which see it as just a complicated institution. No progress can be made in understanding what the Constitution is unless we recognize that our constitutional system is a unique, intricate product of text and institutional practice and that the notions of "meaning," "interpretation," and "fidelity" to the Constitution must reflect that duality.

In Part I, we examine three established theories of constitutional interpretation and change and identify the deficiencies of each. In Part II, we propose a more adequate theory. Analytically, our account tries to explain informally what it is, in terms of the philosophy of language, for the "meaning" of the Constitution to change, and how various models must be used to understand that change. Recognizing such change, the account analyzes patterns of judicial innovation, the nature of constitutional "interpretations" and "fidelity" to the Constitution, and the criteria for being part of our constitutional law. The normative part of our account is an attempt, not to develop a set of principles for generating results in concrete cases, but to show how the functions of the Constitution help establish when constitutional change is proper and who should make it. It thus seeks to locate the boundaries of constitutional argument within that part of political theory referred to as constitutionalism.

I. THREE THEORIES OF THE CONSTITUTION AND ITS DEVELOPMENT

A. *The Historical Approach*

The historical approach to constitutional interpretation regards the words and intent of the authors of the Constitution as the sole source of constitutional law.[5] Under this approach, the Constitution is to be interpreted in the same manner as any other historical text. One looks to the intent of the authors and to the textual language as understood at the time the document was drafted. One may also rely on prior interpretations provided they comport with the words and intent of the framers. Most versions of the historical approach would permit one, in hard cases, to appeal to a broad conception of intent and to conjecture about what the framers would have decided had they faced a certain issue, even though

4. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934). *See* text accompanying notes 16-30 *infra*.

5. Advocates of this approach include William Crosskey and, most recently, Raoul Berger. *See, e.g.*, 1 & 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION (1953); Berger, *The Imperial Court*, N.Y. Times, Oct. 9, 1977, § 6 (Magazine), at 38 (article drawn from forthcoming book). Judicial statements abound. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 677-78 (1966) (Black, J., dissenting); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402-03 (1937) (Sutherland, J., dissenting); South Carolina v. United States, 199 U.S. 437, 448-49 (1905); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857) (Taney, C.J.). There are extensive statements of historical and nonhistorical approaches by Justice Sutherland and Chief Justice Hughes, respectively, in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

they did not or could not have actually done so. The important point, however, is that the original meaning of a constitutional provision must always be controlling.

The historical approach has several seemingly powerful points in its favor. It explains the preoccupation of lawyers with the language of the document and the prominence of the search for original understandings—two features of our constitutional practice that, for brevity, we shall call the "textual focus." Furthermore, it may seem that since the authors of the Constitution proposed, and the people accepted, a certain document as the supreme law of the land, what was meant at that time should still be legally controlling. Lastly, the idea that a written document can, apart from amendments, change in its meaning or content may seem incoherent.

There are, however, decisive grounds for rejecting the historical approach. Analytically, it cannot account for the actual extent of change in our constitutional law. While it is true that the meaning of a term ("connotation") can remain constant even though the objects to which it applies ("denotation") may change,[6] this simple distinction is not helpful when new items included under a term are significantly dissimilar from those previously recognized.[7] It is also true that conjectures invoking the broad intent of the framers are permitted by the historical approach. But the reliability and fecundity of such conjectures should not be overestimated. Even if we can establish that the goal of the authors of, say, the first amendment, was to ensure that public issues could be fully and freely discussed, this provides us with little guidance in balancing this goal against competing goals such as ensuring public security,[8] or in dealing

6. For example, the meaning of "house" does not change when houses are built or destroyed. *See generally* J.S. MILL, A SYSTEM OF LOGIC 19-25 (8th ed. 1872). Justice Sutherland used the distinction as a way of allowing for new applications of constitutional provisions: "The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 451 (1934) (dissenting opinion) (emphasis in original; footnote omitted). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (Sutherland, J.).

7. For example, the power to "regulate Commerce . . . among the several States," U.S. CONST. art. I, § 8, cl. 3, was early held sufficient to authorize Congress to charter corporations for the construction of a railroad, Roberts v. Northern Pac. R.R., 158 U.S. 1, 21 (1895), or a bridge, Luxton v. North River Bridge Co., 153 U.S. 525 (1894). Later concern with national economic problems and "undesirable" local activities gradually led the Supreme Court to accept the commerce clause as support for legislation of widely different sorts. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (wage and hour legislation); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (labor practices). Sometimes the economic effect was tangential, as in Wickard v. Filburn, 317 U.S. 111 (1942) (penalty on wheat produced and consumed at home upheld). In addition, legislation was allowed to prohibit "immoral" practices having a fleeting connection, if any, with interstate commercial activity. *See, e.g.*, United States v. Five Gambling Devices, 346 U.S. 441 (1953) (registration of gambling machines); Hoke v. United States, 227 U.S. 308 (1913) (prostitution); The Lottery Case, 188 U.S. 321 (1903) (lottery tickets). The commerce clause was also used to justify civil rights legislation. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

8. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925).

with nonpolitical literature.[9] Moreover, many important doctrinal developments cannot plausibly be accommodated by this method of analysis. It is, for example, most doubtful that the use of the equal protection clause to bar many forms of nonracial discrimination[10] can be justified by an appeal to the intentions of the authors of that clause.

If one seeks to avoid this conclusion by appealing to the *very* broad intent of the framers—for example, by imputing to them a desire to to create a just society—serious problems arise. One is that claims about such broad goals are apt to be at best weakly supported by the historical evidence. Hence it will be difficult to know whether the justices are carrying out the will of the framers or deciding on other grounds. In addition, such appeals to very broad intent can easily serve as masks for judicial decision-making based solely on judges' perceptions of desirable social goals. It is therefore doubtful that any "historical approach" can produce large amounts of new constitutional doctrine that is any different in practice from a straightforward policy-oriented approach.

The normative deficiencies of the historical approach are even more striking. First, a constitutional system that makes formal amendments very difficult and does not allow for gradual change through interpretation is likely to become rigid and out-of-date. If one accepts that change in governmental structures is inevitable and often desirable, provision must be made for such change.

Second, strict reliance on the historical approach would require us to abandon—or at least to regard as mistaken while continuing to follow —large parts of current constitutional doctrine. As has been argued in detail by Professor Thomas C. Grey,[11] numerous developments in our constitutional law cannot plausibly be justified in terms of original understandings. To many it would be unacceptable, for example, to retrench the protections of privacy and equality afforded by expansive interpretations of the Bill of Rights. And even those not enamoured of the work of the recent Court may perhaps concede that a great deal of doctrinal and social disruption would result if one were to turn back the clock.

Third, the nature of historical materials and the uses judges can make of them create serious problems for the historical approach. Foremost among these is the likelihood that the historical materials will be incomplete, inaccurate, or conflicting.[12] In addition, the intentions of individuals are notoriously difficult to ascertain, and it is especially difficult to identify the intentions of a large *group* such as the authors of the Constitution.[13]

9. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (first amendment protection of commercial speech).

10. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971) (equal protection clause protects aliens).

11. Grey, *supra* note 1, at 710-14.

12. *See* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 503-06 (1964).

13. Wofford offers a useful discussion of the problems of the various intents of the framers, ratifiers, and so on. *Id.* at 507-09. For difficulties concerning intents of groups,

Even when there might be sufficient evidence for an expert historian to arrive at a clear result, a judge may not be equipped to do so or to evaluate another's claim to have done so. Moreover, given the difficulty of securing amendments, practitioners of the historical approach may, consciously or subconsciously, be moved to use slanted or fabricated history to justify results they favor on other grounds.[14] This procedure may lead to acceptable results in particular cases, but its misuse of historical materials might hinder critical examination of the real reasons for the decision and lead to doctrinal distortions to be contended with in the future. Of course, any procedure involving the assessment of evidence is vulnerable to error and mishandling; the point is that the risks are exacerbated with historical evidence because judges are not trained historians and operate under pressures that may deflect them from historically generated results. Furthermore, it should be noted that there is a special danger in allowing a controversial case to turn on an historical claim if the claim is not beyond dispute. Since good historical research is not within the competence of most judges, the antecedent probability of mistakes is high. This increases the chances that professional historians will challenge and refute the Court's reading of history, thus undermining the basis, or ostensible basis, for the decision.[15]

A fourth normative difficulty with the historical approach is that the original intent, even when it can be determined by judges, will sometimes be unpersuasive. Because conditions have changed greatly since the Constitution was written, we should expect that some of the results and rationales for decisions generated by a historical interpretation will be unappealing. It is not clear why the will of the people of two hundred years ago should, aside from the wisdom that will contains, completely control our constitutional practices today. The current authoritativeness of original understandings depends in part on the strength of the framers' reasons for their choices and the applicability of those reasons today.

B. *Institutional Theories*

When one recognizes the deficiencies of the historical approach, a natural reaction is to view the Constitution as part of the practice of ongoing government. A theory reflecting this view is presented in an important but neglected essay by Karl Llewellyn.[16] It is part of a legal

see MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966). In regard to whether the particular intentions of framers should be considered, Dworkin has suggested—in the related area of statutory construction—that we should not be concerned with the mental state of particular legislators, but instead consider what interpretation of a statute best fits it within the legislature's general responsibilities. R. DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 81, 108 (1977) [hereinafter cited as Dworkin, *Hard Cases*].

14. These matters are ably documented in Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

15. *See* Wofford, *supra* note 12, at 528.

16. Llewellyn, *supra* note 4. Llewellyn indicates, *id.* at 1-2 & nn.1-2, that his view is also shared by A. BENTLEY, THE PROCESS OF GOVERNMENT (1908), and H. MCBAIN, THE LIVING CONSTITUTION (1927).

realist program which emphasizes patterns of official behavior and discounts the significance of legal rules or verbal formulations of the law.[17] Llewellyn opposes his theory to what is in effect a version of the historical approach.[18] He argues that although some current practices can trace their roots to the text, many changes in constitutional doctrine since 1789 are so sweeping that it is impossible to represent them as textual interpretations.[19] For him, "[w]hat is left, and living, is not a code, but an *institution*."[20]

Llewellyn's theory is elaborated as follows: An "institution" is a set of patterns of behavior, partly similar and partly complementary and competing, among a group of people. That institution which we call the Constitution involves the activities of interested groups and the general public as well as those directly concerned with governing.[21] The Constitution is not, however, the entirety of this behavior but only its *fundamental* part. More precisely, it consists of those regular practices which resist easy change and which have some important function in governmental operations.[22] Nevertheless, no hard and fast line can be drawn between the Constitution and "mere working government"; there will be penumbral patterns of behavior which cannot be firmly placed on either side. Still, it is possible to say that practices such as political patronage and conference committees in Congress are definitely part of the Constitution, while affairs such as the Inaugural Ball are not.[23] Thus "it is not essential that [a] practice . . . be in any way related to the Document"[24] to be part of the Constitution.

Much in Llewellyn's account is genuinely illuminating. In particular it was an achievement to show how institutional practices could affect our constitutional law. Yet Llewellyn's insights are contaminated by mistaken assumptions in two respects. First, he assumes that if rules or constitutional provisions do not give utterly plain and easily applicable guidance, they give no guidance worth the name.[25] Since few provisions give clear-cut answers to particular problems, he writes off much judicial interpretation as legerdemain.[26] Llewellyn's critique, however, holds only against a very

17. *See, e.g.*, K. LLEWELLYN, THE BRAMBLE BUSH (2d ed. 1951); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

18. He refers to the theory he opposes as "the orthodox theory." Llewellyn, *supra* note 4, at 3-4.

19. Llewellyn notes that the money and borrowing powers of article I, § 8, cls. 2 & 5, have been held, over time, to allow first a national bank, later the Federal Reserve System, and eventually securities affiliates. The connection of the last with the document, he observes wryly, "escapes my untrained eye; the giddy trapeze-work of constitutional theory is not for mere commercial lawyers." *Id.* at 14 n.28.

20. *Id.* at 6 n.13 (emphasis added).

21. *Id.* at 17-26.

22. *Id.* at 26-31.

23. *Id.* at 26-33.

24. *Id.* at 30.

25. Thus he writes: "If rules decided cases, one judge would be as good as another, provided only the cases had been adduced before him." *Id.* at 7.

26. "Only because the Supreme Court has been so good at three-card monte, has made so much *seem* to be where it was not, have the Document and [the orthodox] Theory been able to survive so long." *Id.* at 17 (emphasis in original; footnote omitted).

formalistic conception of legal rules, and overlooks the fact that constitutional rules, though rarely completely clear, are as a general matter sufficiently informative to shape behavior.[27] A judge might try to apply the cruel and unusual punishment clause by turning in part to linguistic and conceptual analyses of cruelty as well as by looking at prior decisions. Once constitutional rules and language are seen in this light, it becomes less plausible to assert, as Llewellyn implies, that our coustitutional law often has only a fleeting connection with the text and its interpretations.

Llewellyn's second mistaken assumption is that *fundamentality* of institutional practice is the touchstone of what is constitutional, but in fact this criterion spawns several counterintuitive results. One is that some clear mandates of the constitutional text, such as the prohibition of titles of nobility,[28] would not be considered part of the Constitution because they are not basic to the workings of the government. Another is that some matters fundamental to government would be regarded as having constitutional status even though they do not. Examples include political patronage and conference committees as well as major regulatory statutes such as the federal antitrust laws.[29] It is plainly a mistake to elevate these items to the same class as the power to declare war or the guarantee of freedom of speech. A final counterintuitive result is that all fundamental institutional practices are in Llewellyn's account seen as vulnerable to or insulated from change in the same way, namely, through alteration in or maintenance of the behavior patterns of those involved in government. However, matters that we regard as having constitutional status generally exhibit a different sort of entrenchment from other practices. If a matter is coustitutional, then its abrogation typically is an appropriate subject for formal amendment and not for statutory change. Thus abolition of Congress's power to declare war could be made by formal amendment, though one might allow that this could be changed in other ways as well. In contrast, the elimination of political patronage or conference committees would not be appropriate for the formal amendment process; for these matters a statute would be ample.[30]

It may be replied that these criticisms of Llewellyn turn merely on different senses of the word "constitution." In Llewellyn's sense, the results detailed above are not counterintuitive but just obvious consequences of

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27. As H.L.A. Hart has argued, while legal rules and language do not bind rigidly, and while they exhibit open texture and may have exceptions not exhaustively specifiable in advance, they still provide guidance. H.L.A. HART, THE CONCEPT OF LAW 135-36 (1961).

28. U.S. CONST. art I, § 9, cl. 8.

29. The first two examples may be found in Llewellyn, *supra* note 4, at 29-30. Indeed, since Llewellyn wrote, certain patronage dismissals have been held unconstitutional. *See* Elrod v. Burns, 427 U.S. 347 (1976). The Sherman Act is seen as having constitutional stature in Miller, *Change and the Constitution*, 1970 L. & SOC. ORD. 231, 247-48. Miller's approach to constitutional law—presented also in Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963)—has many features in common with Llewellyn's.

30. These issues are taken up later in our own account of constitution-identity. *See* text accompanying note 108 *infra*.

his theory. This reply may have some surface plausibility, yet we do not think that the issues posed by constitutional change can be adequately confronted if they are seen as merely involving the proprieties of, or irresolvable differences between, linguistic usage. For what is ultimately at stake is the best way of accounting for and formulating prescriptions in regard to an important range of legal phenomena. If so, it is a disadvantage of Llewellyn's theory that it does little to elucidate the textual focus of our constitutional law and that it seems committed to the normative proposition that there is no particular reason why the text and its meaning should figure importantly in constitutional decision-making.

If the defects of Llewellyn's theory stem in large measure from his rejection of the textual focus, it is in order to consider what might be viewed as an attempt by Professor Charles A. Miller to overcome them by combining the historical and institutional approaches.[31] Miller distinguishes between a *Constitution,* which is "a formal written document describing a pattern of legal rules and institutions that function for political purposes," and a *constitution,* which is "a pattern of political relationships which may be, but need not be, defined in legal instruments."[32] Miller suggests that the United States has both a Constitution and a constitution.[33] The textual focus of our constitutional practice relates to the former,[34] and Miller appears to think that the meaning of the Constitution is static.[35] Nevertheless, growth and development can occur because the United States "Constitution" is narrower than its "constitution," and the political relationships which constitute the latter can change. Thus, "should it be insisted that a written document must stay the same, it is the constitution rather than the Constitution of the United States that changes."[36]

Miller's position is in one respect an improvement on Llewellyn's, since he recognizes the importance of the text in our constitutional practice. But his theory is flawed in that it fails to challenge Llewellyn's unsupported assumption that the meaning of the constitutional document cannot change without formal amendment. Moreover, Miller fails to show how the immutable Constitution embodied in the document is related to the protean "constitution" comprising our political institutions. Thus it is impossible to

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31. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 149-69 (1969).
32. *Id.* at 150 (footnote omitted).
33. *Id.* at 150-51.
34. *Id.* at 153.
35. *Id.* at 150-51. *But see* note 36 *infra.*
36. C. MILLER, *supra* note 31, at 151 (footnote omitted). Miller seems to suppose that written documents cannot change in meaning. *Id.* at 150-51. However, he subsequently appears to question such an assumption, *Id.* at 151 n.3, and later says that "since the Constitution was adopted . . . the meaning of the text has changed." *Id.* at 155. Hence it is at least possible that he has no uniform position on this issue. Miller may have fallen into this confusion by failing to distinguish between the meaning of an utterance made by a particular speaker at a particular time and the meaning of words in a language. One might try to make his position consistent by suggesting that at some points he regards the document to be static in terms of utterance meaning and that at others he is speaking of the language meaning of words used in the text. For further consideration of the distinction between utterance meaning and language meaning in the context of our own theory, see note 2 *supra;* text accompanying note 61 *infra.*

be certain which notion would prevail, in Miller's view, when they yielded contradictory results in particular instances. One must suspect, however, that Miller's homage to the textual focus is ultimately mere lip-service, since the rules of our living political institutions would apparently prevail in his eyes over the precepts of an ancient document.

C. *Dworkin on Concepts and Conceptions*

An attempt to avoid the pitfalls of both the historical and institutional views is found in Professor Ronald Dworkin's theory of legal concepts. The theory rests on a distinction between *concepts* and *conceptions*[37] and is, though highly suggestive, sketchy and imprecise at many points. The statement presented here seems to us the most plausible reading of Dworkin's view, though perhaps he might prefer to develop it differently. The object of the distinction is to justify the claim that the core meaning of the Constitution remains unchanged even when judges diverge from the specific content that the framers would have found there. To appeal to a conception is to appeal to a specific understanding or account of what the words one is using mean. To appeal to a concept is to invite rational discussion and argument about what words used to convey some general idea mean. Concepts are not tied to the author's situation and intentions in the way that conceptions are.[38] Broad phrases such as "cruel and unusual punishment," "freedom of speech," "due process," and "equal protection" tend to be vague and abstract. While Dworkin is apparently not committed to thinking of the concepts denoted by these phrases as utterly lacking in content, their content is not usually specific enough to decide troubling cases involving issues such as capital punishment. They are "contested" concepts; their proper content is always disputable.[39] Even though people may agree on some paradigm cases of what is and is not cruel and unusual punishment, the boundaries of this concept are always open to dispute.

Two points should be noted concerning the abstract character of concepts. One is that Dworkin does not suggest that it is impossible

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37. *See* R. DWORKIN, *Constitutional Cases*, in TAKING RIGHTS SERIOUSLY, *supra* note 13, at 131 [hereinafter cited as Dworkin, *Constitutional Cases*].

38. Dworkin introduces the distinction as follows:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness that I might have had in mind.

Id. at 134 (emphasis in original).

39. *See* Dworkin, *Hard Cases*, *supra* note 13, at 103-07, 126-27, and *passim*. Dworkin, *id.* at 103 n.1, adopts this notion from Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1955-56).

to argue rationally about their proper content. He develops elaborate categories to show how an ideal judge would choose among competing conceptions of legal concepts. Briefly stated, Dworkin's idea is that a judge should choose the conception implied by the most coherent account of the principles underlying the legal system and all the nonmistaken legislation and decisions within it.[40] The second point is that concepts alone, because they are abstract, do not generally yield specific results in difficult cases. A conception of the true meaning of the concept must be added. A conception explains why the paradigm cases are instances of the concept and ties their character to some feature of the case at bar, thus generating a particular result.[41]

The authors of our Constitution undoubtedly had conceptions of their own, but in Dworkin's view these are not binding on later interpreters and need not be used in deciding cases now. Dworkin holds that the framers did not intend[42] to give their own conceptions any special weight: "If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular theories of the concepts in question."[43] For example, Dworkin's view is that the authors of the Constitution were not giving, or even trying to give, instructions not to use some particular set of punishments when

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40. This idea is linked to Dworkin's position that, in virtually all instances, lawsuits have uniquely correct results and judicial decisions declare preexisting rights. *See* Dworkin, *Hard Cases, supra* note 13, at 81, 87, 105; Dworkin, *No Right Answer?*, in LAW, SOCIETY, AND MORALITY: ESSAYS IN HONOUR OF H.L.A. HART 58 (P. Hacker & J. Raz eds. 1977). This position cannot be discussed here, but is the subject of Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055 (1977), and the response in Dworkin, *Seven Critics, id.* at 1201, 1241-50. This last essay may modify Dworkin's coherence theory of justifying decisions, as it now appears to be allowed that the best justification may give greater weight to "sound political morality" than to "fit" with institutional history. *Id.* at 1252-55.

41. The following passage illustrates Dworkin's view of what is involved in having a moral concept and suggests the nature of a conception:

> Suppose a group believes in common that acts may suffer from a special moral defect which they call unfairness, and which consists in a wrongful division of benefits and burdens, or a wrongful attribution of praise or blame. Suppose also that they agree on a great number of standard cases of unfairness and use these as benchmarks against which to test other, more controversial cases. In that case, the group has a concept of unfairness, and its members may appeal to that concept in moral instruction or argument. But members of that group may nevertheless differ over a large number of these controversial cases, in a way that suggests that each either has or acts on a different theory of *why* the standard cases are acts of unfairness. They may differ, that is, on which more fundamental principles must be relied upon to show that a particular division or attribution is unfair. In that case, the members have different conceptions of fairness.

Dworkin, *Constitutional Cases, supra* note 37, at 134-35 (emphasis in original).

42. In general, Dworkin views the "intent of the legislators" as a contested concept. Claims about what was intended are not to be settled exclusively on historical grounds but in terms of which postulated intent would best meet the legislature's constitutional responsibilities. Dworkin, *Hard Cases, supra* note 13, at 108. The authors of the Constitution had no such responsibilities. Hence an account of the background rights they were relying on has to be in terms of what they did and, perhaps, of how the Constitution was subsequently developed. It is unclear whether the claim that they did not intend to give their own conceptions any special standing is to be settled solely on historical grounds, though plainly Dworkin thinks that the kind of language they used is relevant evidence.

43. Dworkin, *Constitutional Cases, supra* note 37, at 136.

they prohibited cruel and unusual punishment in the eighth amendment. They were rather telling officials always to consider whether a proposed punishment is compatible with the best current views about what is cruel. It is as if they were saying, "You have to figure out for yourselves what cruelty amounts to in your time and circumstances, but punishments are to be used only if they are not cruel in terms of the conceptions you arrive at." Since the framers were merely offering for guidance the general concepts, and not their own conceptions of them, it is sometimes justifiable to use conceptions different from those the framers used, and so reach results different from those they would have reached. Hence one can arrive at innovative results without being open to the charge of infidelity to the Constitution.[44]

Thus, Dworkin's distinction between concepts and conceptions is used to make the claim that the framers gave their own paradigms and theories of the broad terms they were using "no special standing."[45] This is not merely the innocuous thesis that the framers knew that the exact content of some of their language would be determined as the new government got started and judges began deciding cases. It is the considerably stronger claim that the broad clauses do not have, and were not intended to have, a sufficiently definite content for it to be possible to use them, without the addition of a current conception, in deciding difficult cases now.

Dworkin's theory has the advantage of explaining how change can occur consistent with the textual focus of our constitutional practice. Nevertheless, it seems mistaken in several connected ways.[46] First, even the broad clauses of the Constitution have more content than Dworkin allows, and he gives no adequate reason why that content should not be considered more fully relevant in constitutional argument and decision-

44. Those who ignore the distinction between concepts and conceptions, but who believe that the Court ought to make a fresh determination of whether the death penalty is cruel, are forced to argue in a vulnerable way. They say that ideas of cruelty change over time, and that the Court must be free to reject out-of-date conceptions; this suggests that the Court must change what the Constitution enacted. But in fact the Court can enforce what the Constitution says only by making up its own mind about what is cruel.

Id. Fidelity to the Constitution is therefore compatible with introducing constitutional doctrine that is substantially different from what preceded it and from what the framers would have accepted.

For the application of Dworkin's account to current constitutional issues, see D. RICHARDS, THE MORAL CRITICISM OF LAW (1977). Richards accepts Dworkin's approach to constitutional adjudication and the concepts/conceptions distinction, *id.* at 41-44, 52-53, but gives them a historical twist, and argues that the contract theory of morality in J. RAWLS, A THEORY OF JUSTICE (1971), provides the best conceptions of moral concepts embedded in the Constitution. On the relations between their legal theories, *compare* Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069 (1977) *with* Dworkin, *Seven Critics*, *id.* at 1201, 1250-58. Richards' position is critically examined in Munzer, Book Review, ___ RUTGERS L. REV. ___ (1978).

45. *See* Dworkin, *Constitutional Cases*, *supra* note 37, at 135.

46. We cannot take up here the question, belonging to logical theory and the philosophy of language, of whether it is possible in principle to distinguish concepts from conceptions, and if so how that is to be done.

making. Ordinarily in interpreting someone's instructions one attends not only to the concepts used but also to the instructor's intentions and situation. In so doing one often finds that an apparently vague word or phrase has a relatively clear meaning in the context. For example, a person may be using a vague phrase in a context where it has a more precise meaning because of a customary or explicit definition. Thus, a vague phrase like "fair hearing" may have a relatively definite meaning within a school system in which there are established customary standards as to what constitutes a fair hearing in dismissal proceedings. Many constitutional commentators have assumed that the phrases of the Constitution can and should be interpreted in the way this example suggests and therefore that, when terms the framers used had a previous legal usage—for example, "bill of attainder,"[47] "cruel and unusual,"[48] or "due process of law"[49]—that usage is relevant. Dworkin has done nothing to criticize this kind of constitutional commentary, or to support his claim that the framers were merely offering concepts and not their own conceptions for guidance, save to note the vagueness of the language they used and the inconvenience of this approach if one wants to reach the conclusion that capital punishment is unconstitutionally cruel. Although such evidence is not decisive[50] —and admittedly becomes less valuable over time—Dworkin does not adequately allow for the *relevance* of historical language, intent, and context. It is true that these are pertinent, in his scheme, to the identification of the *concepts* the framers were using. But in our view that does not exhaust their relevance. Historical language, intent, and context also bear on the *conceptions* the framers had of those concepts, and hence on the instructions they were giving. If such considerations are to be ignored, this should not in any case be on the weak grounds that Dworkin suggests.

Second, Dworkin claims that whether a person intends to give his own views special standing makes a difference in the "*kind* of instructions given,"[51] but this is really a matter of degree. It is not easy to classify the clauses of the Constitution into just the two kinds that Dworkin's theory allows. The amount of particular guidance that the framers intended to give seems to vary from provision to provision.[52] There are *many* things that a person using a general concept to give instructions might be doing. He might be offering the general concept and nothing

47. U.S. CONST. art. I, § 9, cl. 3; art. I, § 10, cl. 1.
48. U.S. CONST. amend. VIII.
49. U.S. CONST. amends. V; XIV, § 1.
50. *See* text accompanying notes 11-15 *supra.*
51. Dworkin, *Constitutional Cases, supra* note 37, at 135.
52. For a discussion of theories of the Constitution which emphasize the differences between general and specific clauses, see C. MILLER, *supra* note 31, at 162-65. *See also* United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934). A special difficulty for theories that divide all clauses into general (or vague) and specific is that judges sometimes do not agree how a given clause should be classified. *See* Wofford, *supra* note 12, at 515-18.

more, while giving no hints as to intended interpretation or scope; he might be using the concept and giving a few indications as to how he wants it generally to be applied (for example, whether he wants it applied broadly or narrowly); or he might be offering a concept and including with it a substantial number of instructions as to how it is to be applied in certain controversial cases.

Third, Dworkin's account of fidelity to the Constitution is insufficiently candid. Dworkin's strategy for making fidelity compatible with substantial constitutional change involves extruding some content from the original document and its amendments.[53] As a result, the very constitutional materials to which new decisions are likely to be unfaithful are conveniently absent. Remaining is a framework broad enough to allow for decisions quite different from those generated by original understandings. Dworkin tries to justify this approach by suggesting that it is only what the framers intended, but this suggestion is doubly questionable. First, Dworkin's claim is undefended and implausible. Here two questions about the framers should be carefully distinguished: whether the framers intended that a court should occupy itself with searches for their conceptions, and whether the framers intended that a court should knowingly adopt its own conceptions rather than theirs. We have argued in effect that Dworkin's negative answer to the former question is dubious in many instances.[54] But even if one allowed his answer, it would not follow that Dworkin is right in giving an affirmative response to the latter question. The framers might have anticipated that later their own conceptions would sometimes be unrecoverable but might not have licensed a court to substitute its own conceptions when their conceptions are readily ascertainable. Second, Dworkin's claim puts the focus of argument in the wrong place. The grounds for continued adherence to the basic structure of the Constitution as well as to the framers' conceptions when recoverable should be articulated in terms of current political considerations rather than giving controlling power to the intentions of people who are long dead. The important thing is not what was originally intended, but what has subsequently been done with the document and the role it now plays.

II. Toward A More Adequate Theory of Constitutional Change

Having criticized three theories of constitutional change and development we are now able to identify the central problem that must be con-

53. Dworkin seems to try to have it both ways. He wants particular legal concepts to be empty enough to allow for innovation and development, but the whole of the legal materials to be rich enough to rule out strong discretion. One might wonder whether such poverty of the parts is compatible with such richness of the whole. We would emphasize that we are not questioning Professor Dworkin's candor; only whether his theory allows for as much candor about innovative decisions as do our constitutional practice and any acceptable account of it.

54. *See* text accompanying notes 42-50 *supra*.

fronted in developing a more adequate theory. That problem is the tension between change in constitutional norms and the textual focus. If a new theory is to improve on past efforts, it must account for a changing Constitution while explaining the central role of the text without depleting that text of its original content. The theory offered here attempts to accomplish this task. Analytically, it holds that authoritative interpretations can modify the meaning of the Constitution and that the present content of the document results from the interaction over time of framers, judges, legislatures, and executive officials. Change occurs in the meaning of the Constitution itself, not merely in its interpretations or in the meanings of certain words belonging to the English language. Normatively, the theory that constitutional change through interpretation is necessary and desirable, and some guidance as to when such change is in order, can be found in the functions of the Constitution.

A. *The Problem of a Written Constitution*

The root of the problem of meaning-change stems from the idea that we have a written constitution. That idea is in some sense obviously right. But is it completely right? To grapple with this question it is instructive to consider a syllogism advanced by Justice Brewer: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."[55] The conclusion of this argument follows logically from the premises. Thus to deny the conclusion one must deny at least one of the premises. The first premise says that ours is a written constitution; the second says that a written constitution cannot change in its meaning. These premises will be considered in turn.

1. *A Partially Written Constitution.* If our Constitution were simply a body of unwritten customary rules, little difficulty would be encountered in understanding how its meaning could change.[56] Rules without complete canonical formulations can plainly be modified by the informal formulations they receive from time to time. Some may doubt whether this is true of written constitutions, especially since the point of writing down rules may be to limit such change. Reflection reveals, however, that the clauses of the U.S. Constitution are, in at least two ways, only partial formulations of constitutional law. First, these clauses do not give the full or exact scope of all constitutional rules specified in the text; to determine that one must, among other things, read the relevant cases. Second, they do not even mention some

55. South Carolina v. United States, 199 U.S. 437, 448 (1905). These premises are the foundation of the historical approach. *See* notes 5-15 and accompanying text *supra*. There we analyzed the operation of a theory based on this foundation. In this section we examine the validity of its underlying premises.

56. Such an approach to constitutional development is suggested by Charles A. Miller's distinction between the *Constitution* as a formal written document and the *constitution* as a pattern of political relationships. *See* C. MILLER, *supra* note 31, at 149-69. Miller's analysis is a reaction to the sort of argument Justice Brewer makes, and is critically discussed at text accompanying notes 31-36 *supra*.

constitutional rules, namely those which, like the right to travel and the right of privacy,[57] are not found in any particular provision of the text.

2. *The Need for Change in the Written Constitution.* The conclusion that the Constitution is composed of both a written text and formulations of additional rules does not allow us fully to rebut Justice Brewer's argument. It might still be asserted that the written Constitution has retained precisely the meaning it had when ratified, and that only those constitutional rules which lack a canonical formulation in the original document have undergone a change in meaning or content. This will not do, however, if a phrase from the written Constitution is now to describe a rule that is radically different from the rule that the phrase originally formulated. If a provision P of the Constitution originally gave an accurate description of rule R of constitutional law, and that rule has changed substantially so that it is now a different rule R', it is hard to imagine how P can without change in meaning now be a full and accurate description of R'. For P to be an accurate description of R' it must have a different meaning from that which it had when it was an accurate description of R. For example, the freedom of speech and press guaranteed by the first amendment was originally concerned essentially with political speech and perhaps allied forms of communication expressing ideas in science, art, morality, religion, etc. So understood, that amendment did not give any protection to commercial speech such as advertising.[58] Under recent decisions, however, certain forms of advertising receive some shelter under the first amendment.[59] Thus, to state the matter generally, we must either abandon words used in the text as accurate descriptions of much-modified rules, or admit that the words do not now mean what they meant.

3. *Authoritative Interpretation as the Instrument of Change.* The issue in analyzing Justice Brewer's second premise is not whether something that an authoritative interpreter does can change what a constitutional provision meant; its original meaning is a historical fact not subject to change. It is rather a question of whether the action of an authoritative interpreter can change what the provision will thereafter mean.[60] Now to some an affirmative answer will seem beset by an

57. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (constitutional right to travel established); Griswold v. Connecticut, 381 U.S. 479 (1965) (constitutional right of privacy established).

58. *See, e.g.,* Valentine v. Chrestensen, 316 U.S. 52 (1942).

59. *See* Bates v. State Bar of Ariz., 97 S.Ct. 2691 (1977) (advertising by lawyers); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (advertising by pharmacists). Without merit is the objection that change in meaning need not be invoked if either the earlier or the later decisions are mistaken. For while an authoritative interpretation can sometimes properly be criticized as a mistake, such criticism does not deprive the interpretation of constitutional status unless it quickly leads to the overturning of the interpretation or makes such overturning likely. *See* text accompanying note 109 *infra.*

60. We do not take up here how retroactively applied interpretations are to be analyzed. Perhaps some such interpretations can be seen as declarations of the "correct" meaning of a constitutional clause. But often this declaratory analysis of retroactivity will be most im-

insuperable difficulty, namely, the fact that philosophers often think of the meaning of an utterance as being fixed for the present and for the future by the author's language and intent. It is not, of course, problematic to say that change occurs in the meanings of words in a language; the meaning of "wonderful," for example, is now somewhat different from what it was prior to the eighteenth century. But it is problematic to say that an utterance which a particular person made at a particular time can have one meaning at that time and another meaning later.[61]

Yet even if utterance meaning in the standard case is unalterable, for two reasons that is no bar to change in the meaning of the constitutional text. The first is that the original document cannot be counted an "utterance" in the usual sense. The standard or paradigm case of an utterance is when one person speaks or writes a sentence on a particular occasion; its meaning is typically a function of the utterer's intentions together with the context and the senses assigned to those words in grammatical combinations in a given language. In contrast, the sentences of the Constitution were products of more than one person (draftsmen, framers, ratifiers) and more than one time (successive drafting, debating, adoption, and ratification stages). No doubt in the process statements were made which are susceptible of being analyzed as standard utterances. But the eventual product is not thus susceptible: if the text of the Constitution is an utterance or set of utterances at all, it is not so in the standard sense. Its original meaning may, it is true, still be a function of the various intentions, contexts, and words that led to it. Yet if so, given the number of persons involved at different times and in different situations, that meaning will be an extraordinarily complex function of those elements.

The second reason is that the original text serves through authoritative interpreters to give ongoing guidance in changing circumstances. Perhaps the idea that the meaning of a text composed of standard utterances cannot change is satisfactory where no one is empowered to make official determinations of its meaning, or where the language is not intended to provide a reason for action, or where directives supplied by the text apply only in a finite number of static situations. But if we turn our attention to law, it

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plausible, and some different account will be needed of how the legal significance of past events can now be changed. A theory of the appropriate sort, which may be conjoined with our view of constitutional change, is developed in Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977).

61. As one contemporary philosopher of language has written:

> A speech has a date and duration, not so its meaning. When a speech is over nothing can change what is meant. What has been said cannot be unsaid, though later remarks can contradict it. Even the ambiguities in this evening's speech must remain such forever, though tomorrow's press conference may clarify the speaker's intentions. Though the speech may be differently translated in different countries or at different periods, no one could judge the correctness of each new translation unless he assumed the meaning of the original speech to remain the same. Though expositions of what has been said can change, they can also be criticized, and the question whether a given exposition is loose or close, fair or biased, accurate or inaccurate, would not arise unless the meaning itself were invariant under exposition.

L.J. COHEN, THE DIVERSITY OF MEANING 3 (2d ed. 1966).

does not seem so strange that the current meaning of a constitutional provision should be the result of the activities of both the authors and the officials who applied it. Authoritative interpreters, in their institutional capacity of determining what a provision means in unanticipated situations, supplement or modify the meaning or content of the provision. The institutional practice involved in the use and interpretation of constitutional language is one in which the responsibility for creating the current meaning of a constitutional provision is spread among different people at different times; the power of creating meaning is broken into shares. The original authors of the Constitution determined the meaning it would have unless and until it was changed or developed through amendment or decision, and thereby set out the general direction of its future development. The meaning of the Constitution changes as it is interpreted. Authoritative interpretations of the text often create a new meaning for it, and the original meaning, or whatever had previously replaced it, ceases to be the current meaning. Hence we say that the current meaning of a constitutional provision is the result of interaction over time between the framers and its authoritative interpreters. This interaction is a dynamic process; it may often take the form of cooperation, but there may at times be tug-of-war or outright conflict between different interpreters.

It is now clear that both premises of Justice Brewer's argument must be rejected. Our Constitution is first of all not merely a written instrument. Viewed more accurately it is a text-based institutional practice in which authoritative interpreters can create new constitutional norms. Secondly, the meaning of a written document like the text of the Constitution can intelligibly be said to change. The "meaning" possessed by the text differs from utterance meaning as standardly conceived, and was originally the product of many persons. That initial meaning has subsequently been altered in an interactive institutional process.

B. *Types of Authoritative Interpretation*

1. *Models of Judicial Change.* If the proposition be granted that change in constitutional meaning is coherent, there arises the question how such change is to be understood. One suggestion would be that there is an *openness* in constitutional provisions which allows their meaning to be developed by judges.[62] The operative image typically is of an open place, a gap or hole that must be filled by the judge. This analogy has implications for both the legitimacy and the proper scope of the judge's creative role. That role is legitimated by showing that the legal language does not—since it is open or indefinite—provide full guidance in regard to many issues. By filling in gaps

62. An example is Hart's famous idea of "open texture." *See* H.L.A. HART, *supra* note 27, at 121-32. *See also* H.G. GADAMER, TRUTH AND METHOD 304 (G. Barden & J. Cumming trans. 1975) which, in discussing legal hermeneutics, holds that the "line of meaning" revealed to the judge "breaks off in an open indefiniteness."

left by the authors, the judge becomes a coauthor of the current meaning of the provision. The openness analogy also suggests the proper limits of the judge's role; the boundaries of the gap set the limits of judicial creativity. The judge does not create the structure; he only operates within it. His authority is limited to filling in what has been left out.[63]

A related analogy is that of the Constitution as a living organism that grows. *Growth* is a kind of natural, gradual, ordered, predictable and desirable change that occurs within an organism whose identity remains constant. Change of this sort is in accordance with the nature of the organism; it is provided for in the "program." To see constitutional change in this way is to put it in a favorable light. It is to see it as the sort of natural and gradual development that was anticipated by the framers.

While these metaphors of openness and growth can explain many judicial decisions, sometimes the amount of innovation is so great that a more radical metaphor of *reauthoring* or informal amendment is required. Examples of informal amendments might include extension of the first amendment to certain forms of commercial speech[64] and upholding a mortgage moratorium law or a statute limiting reinstatement rights in the face of the contract clause.[65] Although the reauthoring or amendment effected by an innovative decision does not take the canonical form of a formal amendment, it does give a new meaning to some of the language in the text. These amendments are usually small and incremental, and hence lack the dramatic impact that formal amendments often have. Still, should an informal amendment become entrenched, a formal amendment to the same effect is no longer appropriate. The primary use of the reauthoring model is that it explains cases in which authoritative interpreters go beyond merely filling in interstitial gaps in a textual scheme. Of course, the fact that informal amendments are intelligible and in fact occur does not show that they *ought* to occur. Whether and in what circumstances judges ought to make radically innovative decisions is a normative issue which is given separate consideration later.[66]

2. *Legislative and Executive Interpretation of the Constitution.* Judges are not the only authoritative interpreters of the Constitution. In this section we extend our account to the coordinate power of interpretation of Congress and the President.[67] It would be a mistake to approach the matter in a doctrinaire fashion. If no provision of the Constitution expressly grants Congress or the President power to interpret it, it must be

63. This is the point of Holmes's and Cardozo's talk of working within "interstitial" limits. *See* Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-15 (1921).

64. *See* cases cited in note 59 *supra.*

65. *See* City of El Paso v. Simmons, 379 U.S. 497 (1965); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

66. *See* text accompanying note 122 *infra.*

67. The openness, growth, and reauthoring models just discussed apply also to legislative and executive interpretations. We do not consider here how far, if at all, constitutional change can be introduced by administrative agencies, state officials, or the people as a whole.

remembered that the Constitution lacks a clause explicitly authorizing judicial review. And if the Supreme Court generally has final say on what the Constitution means, the legislative and executive branches may yet be free to speak in areas that the Court has not occupied or to influence what the Court says. Here we present two examples, not necessarily typical, of their role as authoritative interpreters. Our chief aim is to show that Congress and the President can alter the meaning of the Constitution. The discussion also brings out a pair of subsidiary points: first, that occasionally a congressional interpretation may prevail over a contrary interpretation by the Supreme Court; and second, that the practice or usage of the executive, not merely its announced interpretations, may play a role in determining the content of the Constitution.

a. *Congress, the Equal Protection Clause, and Enforcement Legislation.* The fourteenth amendment provides in its first section that no state may "deny to any person within its jurisdiction the equal protection of the laws."[68] Section 5 of that amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[69] Much controversy has swirled around the original intent behind the fourteenth amendment and in particular the equal protection clause.[70] But the argument seems fairly strong that the framers did not intend, in the enforcement clause, to give Congress power to alter the meaning or substantive scope of the equal protection clause. Rather Congress was to be limited to legislation rectifying discriminatory action by the states,[71] including, possibly, dealing prophylactically with state discrimination it could genuinely anticipate.

There is strong reason, however, for believing that federal legislation has affected the meaning of the equal protection clause. The issue of voting rights is one important illustration. In 1959 the Supreme Court in *Lassiter v. Northampton County Board of Elections*[72] refused to hold unconstitutional a requirement of the North Carolina Constitution that all voters be able to read or write any section of it in English. Six years later, in section 4(e) of the Voting Rights Act of 1965,[73] Congress decreed that no person who had completed the sixth grade in an American-flag school could be denied the right to vote because of inability to read and write English. The constitutionality of this section was upheld in *Katzenbach v. Morgan*,[74] a case involving prohibition of the enforcement of a New York election law con-

68. U.S. CONST. amend. XIV, § 1.
69. U.S. CONST. amend. XIV, § 5.
70. *See, e.g.*, R. HARRIS, THE QUEST FOR EQUALITY (1960); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).
71. *See* Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 32-40 (1955). *See also* R. HARRIS, *supra* note 70, at 34-50.
72. 360 U.S. 45 (1959).
73. 42 U.S.C. § 1973b(e) (1970).
74. 384 U.S. 641 (1966).

taining an English literacy requirement. The Supreme Court agreed that the states can establish voter qualifications so long as they do not violate the federal Constitution. But it refused to say that a judicial determination that enforcement of the New York law would violate the equal protection clause was necessary to uphold section 4(e). The Court reasoned that the enforcement clause alone was sufficient authority for the congressional legislation.[75]

The only plausible explanation of the case is that Congress played a role as an authoritative interpreter. The Court declined to offer any judgment of its own on the constitutionality of the New York law. Rather it deferred to the judgment of Congress, even though in *Lassiter* it had adopted a contrary opinion on the constitutionality of English literacy tests. The wisdom of the Court's action may be doubted. But it is difficult to reconcile *Katzenbach v. Morgan* with *Lassiter* without accepting the idea that a congressional interpretation affected the meaning of the equal protection clause. The Court cannot plausibly be said merely to have sanctioned a congressional response to existing or even genuinely anticipated state discrimination. Rather, Congress altered the substantive scope of the fourteenth amendment.[76]

b. *The President, the Treaty Clause, and Executive Agreements.* The effect of executive interpretation and practice can be illustrated in connection with the treaty clause. The Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." [77] No clause expressly confers authority on the President to make international agreements other than treaties.[78] Nevertheless, Presidents have entered into thousands of "executive agreements" without Senate consent or the approval of Congress.[79] Some of these agreements can probably be explained as contemplated by or necessary to implement treaties, or as incidental to presidential powers enumerated in the Constitution, as, for example, his power as Commander-in-Chief to conclude an armistice agreement. But many executive agreements cannot be so accommodated. In the course of

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75. *See id.* at 649-58. This expansive view of the enforcement clause was foreshadowed to some extent in United States v. Guest, 383 U.S. 745 (1966). There a majority of the Court stated that, with or without state action, Congress may prohibit all acts which interfere with "Fourteenth Amendment rights." *Id.* at 782 (Brennan, J., concurring in part and dissenting in part). *See* Comment, *The Fourteenth Amendment, Congressional Power, and Private Discrimination*: United States v. Guest, 14 U.C.L.A. L. REV. 553 (1967).

76. *See* Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting). For further discussion of these issues see Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Comment, *Congressional Power Under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885 (1973).

77. U.S. CONST. art. II, § 2, cl. 2.

78. The Constitution does allow for an "Agreement or Compact" between States and foreign powers if Congress consents. U.S. CONST. art. I, § 10, cl. 3.

79. As of January 1, 1969, the United States was officially considered to have in force 909 treaties and 3,973 executive agreements. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 210 (1970). Some international agreements have been made on the joint authority of the President and Congress. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173-76 (1972). Our discussion is limited to agreements made on the sole authority of the President.

American history, Presidents have defined American policy in Asia,[80] limited Japanese immigration,[81] placed bankrupt customs houses in Santo Domingo under American control to prevent seizure by foreign creditors,[82] and established diplomatic relations with the Soviet Union.[83] While the framers' understanding of the treaty clause is not entirely clear, it seems most implausible that they intended Presidents to make many important international agreements on their own.[84] Hence there would seem to be a serious issue regarding the constitutional authority for executive agreements.[85]

If the Constitution means what it always meant, some executive agreements are indeed without authority. But if, as we suggest, the meaning and content of our written Constitution can change, then it is possible for these agreements to be valid. The change did not occur overnight. Instead, it resulted from decades of tug-of-war and sometimes outright conflict between the executive and legislative branches over foreign relations.[86] We are not suggesting that treaties and executive agreements are interchangeable.[87] Still,

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80. Root-Takahira Agreement, Nov. 30, 1908, United States-Japan, [1908] FOREIGN REL. U.S. 510-12 (1912), T.S. No. 511-1/2; Lansing-Ishii Agreement, Nov. 2, 1917, United States-Japan, 3 C. REDMOND, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS 2720-22 (1923), T.S. No. 630.

81. Gentlemen's Agreement with Japan, 1907 (substance of the agreement, never published verbatim, is in a letter from Japanese Ambassador Hanihara to Secretary of State Hughes, April 10, 1924, 65 CONG. REC. 6073-74 (1924)).

82. Correspondence Relating to the Protocol of Agreement Between the United States and the Dominican Republic Providing for the Collection and Disbursement of Customs Revenues in that Republic, [1905] FOREIGN REL. U.S. 298-391 (1906). President Theodore Roosevelt was accused in the Senate of usurping the treaty power. *See* 40 CONG. REC. 433-36, 1173-80, 1417-31, 2125-48 (1905-06).

83. Presidential authority for the so-called Litvinov Agreement was upheld in United States v. Belmont, 301 U.S. 324 (1937). The instances mentioned in the text and the *Belmont* case are discussed with other examples in L. HENKIN, *supra* note 79, at 176-84.

84. Explicit authority for the President to make agreements is found solely in the treaty clause. The only other forms of international agreement mentioned—the "Agreement or Compact" of art. I, § 10, cl. 3—are between States and foreign powers. Even if the President were intended to have implicit authority to make agreements other than treaties, there is some support for the position that such agreements must deal with routine or temporary matters. *See* Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 YALE L.J. 664, 667-71 (1944); Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453 (1936). Weinfeld invokes the distinction between treaties on the one hand and "compacts," "agreements," and "conventions" on the other which is drawn in E. DE VATTEL, THE LAW OF NATIONS §§ 152, 153, 192 (J. Chitty & E. Ingraham eds. 1856), an eighteenth century treatise known to the framers.

85. *Compare* Borchard, *supra* note 84, *and* Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945) *with* W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 363-64 (1941) *and* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 YALE L.J. 181, 534 (1945). For a more recent discussion, see L. HENKIN, *supra* note 79, at 173-88.

86. The idea that all agreements must be by treaty was rejected in 19 OP. ATT'Y GEN. 513 (1890). But there has often been senatorial resistance to particular executive agreements. For example, the Yalta Agreement was denounced by one senator as a presidential usurpation of power. *See* 98 CONG. REC. 900 (1952) (remarks of Sen. Ives regarding the conference at Yalta). Again, when the Senate refused to consent to the take-over of Dominican custom houses, President Theodore Roosevelt employed an executive agreement. *See* W. HOLT, TREATIES DEFEATED BY THE SENATE 212-29 (1933); note 82 *supra*. For judicial acceptance of such developments see United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

87. For the idea that executive agreements might be subject to special limitations, see United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). *Capps* is critically discussed in L. HENKIN, *supra* note 79, at 180-84.

it seems plain that the President's interpretation of his powers, the practice of acting on that interpretation, and the Supreme Court's acquiescence have altered the meaning of the Constitution. This alteration might be understood as a narrowing of the meaning of "[t]reaties" in article II, section 2, so that not all "treaties" in the broad sense of international agreements need be "treaties" in the narrow sense requiring consent by the Senate. Yet however the change is understood, the constitutionality of many executive agreements cannot be explained without some adjustment in the content of the Constitution. Even if the Supreme Court can, if it desires, always have the final word on what the Constitution means, it is clear that in fact it does not always give the final word.

C. *Fresh Questions about a Changing Constitution*

The idea that authoritative interpreters can change the meaning of the Constitution brings with it new questions concerning innovation, the textual focus, constitution-identity, and the proper limits of change. What are the most common patterns of judicial innovation? In what ways are innovations related to the text? When under our account should a rule be considered part of the Constitution? Finally, what normative considerations justify change through authoritative interpretation, and what are the implications of our account for actual constitutional practice? These questions will be considered in turn.

1. *Patterns of Judicial Innovation.* Although a full treatment of the many specific varieties of innovation by judges cannot be attempted here, it is worthwhile to mention some of the genera.[88] Perhaps the most frequent kind of innovation changes the scope of an existing provision by making it broader or narrower. A decision may broaden the scope of, say, a prohibition by relaxing some of the conditions that are used in defining the prohibited act. Thus, for example, *Trop v. Dulles*[89] and *Robinson v. California*[90] broadened the prohibition of cruel and unusual punishments so that it forbade some punishments that would previously have been permissible. Similarly, *United States v. Lovett*[91] broadened the prohibition of bills of attainder so that it proscribed things other than legislative determinations of guilt. A decision can also narrow the scope of a prohibition by adding new conditions to the definition of the prohibited act. For instance, in *Home Building & Loan Association v. Blaisdell*[92] the Court held that the prohibition of state laws "impairing the Obligation of Contracts" [93] did not apply to the Minnesota

88. In this section and the next we return our focus to judicial decision-making. Considerations similar, though not identical, to those mentioned below apply to changes made by legislative and executive interpretation.

89. 356 U.S. 86 (1958).

90. 370 U.S. 660 (1962).

91. 328 U.S. 303 (1946).

92. 290 U.S. 398 (1934).

93. U.S. CONST. art. I, § 10, cl. 1.

Mortgage Moratorium Law because that statute simply involved a reasonable postponement of having to meet contractual obligations.

A more far-reaching type of innovation occurs when a judge creates a new rule rather than merely altering the scope of an old one. For instance, judges often develop a new subordinate rule to explain the scope and limits of a broad textual provision that is being applied in a new way—perhaps in an uncharted area or in a way that conflicts with an old understanding. In the *Civil Rights Cases*[94] the Supreme Court decided that the fourteenth amendment does not give Congress power to forbid racial discrimination in privately owned places of public amusement and accommodation. Its decision in effect created a new rule of constitutional law known as the state action requirement. This phenomenon, or something very like it, may be seen in reverse when an old rule is eliminated or made virtually inapplicable. A conspicuous example is *Brown v. Board of Education,*[95] where the doctrine allowing "separate but equal" facilities in public education[96] was disposed of on the footing that separate schools are inherently unequal.

New rules need not, however, be mere subordinate rules which explain the scope of existing textual provisions. Rules can be introduced to cover areas not expressly dealt with by the text in at least three ways. First, a new rule is sometimes derived by implication from other rules.[97] When individuals have a number of rights—for example, those explicitly protected by the Constitution—there may be other rights which support or complement the original rights so closely that it is plausible to view authorization of the originals as authorizing the new rights as well. It would not, of course, be possible to speak of a "new" rule if it were logically entailed by already existing law. The point is rather that, within the conventions of constitutional argument, there is strong—but not deductive—support for the rule in prior law. Note that in this case the text of the Constitution is invoked to justify the new rule, but not in such a direct way that the rule can be said to derive from a single provision.

Second, a judge might follow the method of appealing to "structures and relationships" advocated by Professor Charles L. Black.[98] Black claims that it is necessary to recognize some rights not explicitly mentioned in the Constitution in order to have the governmental structure that it establishes. An example is *Crandall v. Nevada,*[99] where the Court struck down a Nevada statute imposing a tax of one dollar on each person leaving the state. Although the case arose prior to the fourteenth amendment, the Court might have based its decision on either the commerce clause or the export-import

94. 109 U.S. 3 (1883).
95. 347 U.S. 483, 495 (1954).
96. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).
97. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court appealed to a right of privacy, derived from several amendments, that protected married persons from governmental intrusion in the use of contraceptives.
98. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
99. 73 U.S. (6 Wall.) 35 (1868).

clause.[100] Instead, relying on the structure of the federal system, it developed an account of membership in the national polity which included a right to travel unimpeded from any state to the seat of the national government.[101] Such appeals to the governmental structure that we have or are trying to have are similar to appeals to the broad intent of the framers. An advantage to Black's approach over such appeals is that it can accommodate shifts in perceptions of the kind of government that we are trying to have—for example, the more democratic idea of government that has emerged in the last century—and hence justify a different set of rights from those that could be based on an appeal to the broad intent of the framers.

Third, new rules can be justified by appeal to considerations such as natural rights or present community values which are neither found in the Constitution nor derive from the structure of government. It can be argued that the abortion cases[102] exemplify this pattern. Defenses of this sort might appeal to the ninth amendment and thus establish an indirect connection with the text.[103] However, while it is necessary for decisions to be ancestrally linked to the text in order to be part of our constitutional law,[104] this linkage need not be historically correct in the way that the historical approach maintains.[105]

2. *The Textual Focus and Fidelity to the Constitution.* The tension between the textual focus and the recognition that the meaning of a provision can change through interpretation prompts questions about how closely constitutional decisions are related to the text and whether innovative interpretations are compatible with fidelity to the Constitution.

All claims about the import of the Constitution involve interpretation in some broad sense. But finer discriminations are helpful in understanding the role of the text in the process of change. Schematically, five cases of interpretation in the broad sense can be distinguished. In the first, the judge gives an accurate account of what the unmodified content of a provision

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100. U.S. CONST. art. I, § 10, cl. 2.

101. *See generally* the discussion in C. BLACK, *supra* note 98, at 15-17, 27-28. Black concedes that this method has not often been used, but gives suggestions on how it might be employed. For instance, he thinks that it might have been used in Carrington v. Rash, 380 U.S. 89 (1965), where the Supreme Court invalidated on equal protection grounds a Texas statute requiring members of the armed forces to vote in the state in which they resided at the time of entering the service. In Black's view it would have been more satisfactory to base the result on the structure of the federal union and the relation of state and federal governments. C. BLACK, *supra* at 10-11.

102. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

103. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 487-93, 499 (1965) (Goldberg, J., concurring).

104. *See* text accompanying notes 108-09 *infra*.

105. To forestall some possible misunderstandings of our position in regard to innovation, several points should be made. First, our claim that innovation frequently occurs does not imply that we can always tell when it occurs, or that it always occurs intentionally. Second, although we think that a certain amount of judicial innovation is both inevitable and desirable, our goal is not to weigh the comparative merits of various patterns of innovation. Third, the claim that innovation is sometimes desirable does not imply a commitment to a high level of judicial activism. A judge could allow that innovation is sometimes desirable but practice it only infrequently. Such a judge could also rely heavily on congressional and executive interpretations of the Constitution as sources of innovation.

implies for the case at bar. In the second case, the scope of the provision has been slightly broadened or pinched by previous decisions, and the judge is giving an accurate account of the content-as-modified. A third case involves reference to a provision that has been substantially modified by innovative decisions, but the judge is still merely giving an account of the modified meaning. In the fourth case, which makes the second and third possible, the judge assigns a new content to the words of the provision. It is here that text-related patterns of innovation such as broadening and narrowing, introdueing new subordinate rules, and introducing new rules by appeal to "implications" or "structures and relationships" are found.[106] The fifth case is where no explicit connection is made to the text or decisions interpreting it.

To analyze these different cases we need to identify two continua on which they may be arrayed. The first is a continuum of *acts* which can be differentiated according to the degree of evidential support in the text for a judicial characterization. At one end of this continuum are acts such as describing which command very strong textual support, and at the other are acts such as legislating which have very weak support in the text. Interpreting, in a narrow sense, lies in the middle.[107] On this continuum a fully-determined characterization involves *describing* the import of a constitutional provision and a very underdetermined characterization involves *legislating* its import. According to this view it may be said that only the fourth case involves *interpreting* in a strict sense. There is, however, no harm in using the word "interpretation" more broadly to cover a wide variety of acts of characterization—we have done so throughout this Article—so long as we recognize that finer distinctions may be drawn.

The second continuum is a scale of *effects* which can be differentiated in accordance with their degree of departure from the established content of a provision. At one end of this scale lie restatements and reiterations; in the middle additions and modifications; and at the other end substitutions and usurpations. The two continua tend to march in step because our constitutional practice allows authoritative interpretations to exert a force in future cases. Thus acts of describing involve restatements or reiterations, while acts of legislation, if successful, supplant established meaning or inject radically new content into the document. Interpretations, especially in the narrow sense just mentioned, result in addenda or modifications. Hence there is no single way in which constitutional decisions are related to the text, but rather a wide variety of acts of characterization and their effects which involve important differences.

But which of these types of characterization are sufficiently determined by the constitutional materials that they can be said to be faithful to the Constitution? In answering this question it is important to observe that the notion

106. *See* text accompanying notes 88-105 *supra.*

107. *See* Matthews, *Describing and Interpreting a Work of Art*, 36 J. AESTHETICS & ART CRITICISM 5-10 (1977).

of fidelity to the Constitution is another concept whose meaning undergoes a shift as institutional practices change. Early in our constitutional history fidelity to the Constitution may have meant sticking closely to the specific intentions of those who wrote the document. Somewhat later it became a matter of deciding on the basis of the original content together with previous interpretations of the text. Still later, fidelity to the text was taken to be satisfied if the decision was partly based on general principles found in the text and if it was compatible with the framework of interpretative methods and standards that had evolved. What fidelity requires may vary in different parts of our constitutional law in accordance with how accessible the original meaning is and how much development through interpretation the provision has undergone. American constitutional practices now use a concept of fidelity to the Constitution like the one in the third phase described above; fidelity does not now generally require, nor is it thought to require, that cases be decided in accordance with the specific intentions of the framers. Indeed, in our view some historical appeals that ignore the development our Constitution has undergone may actually themselves be unfaithful to the Constitution of the United States.

3. *Constitution-Identity.* In describing constitutional change as a process of authoritative interpretation we tacitly assumed that the rules in question were parts of the Constitution. We now attempt to support that assumption by identifying some criteria which help to explain our intuitive judgments about what is and what is not part of our constitutional law. Though the Constitution is a complex union of text and institutional practice, the text is still sufficiently central to this practice to make a suitable relation to the text the key to constitution-identity. Our basic contention, roughly stated, is that a rule or decision is part of our constitutional law just in case it is found in the text or stands in an ancestral relation to the text. Ancestry obtains when there is an interpretation of the text, or a chain of interpretations at least one of which is eventually tied to the text, which yields the rule or decision. An ancestral relation is most often shown when the Supreme Court invokes some relevant clause in deciding a case—for example, when it settles some question of police surveillance by referring to the fourth amendment and prior cases interpreting it. Ancestry may be exhibited in other ways as well. Congress and the President are also authoritative interpreters of the text and precedents, and hence their interpretations can give constitutional standing to the rules and decisions these interpretations generate.

It is important, however, to make our basic contention more precise and explain how sharp a test it affords of constitution-identity. In our view, an interpretation must satisfy four conditions to be found in or ancestrally related to the text in such a way as to give its products constitutional standing. (i) The interpretation must be *text-focused, i.e.,* it must pertain to the language of the text itself or eventually of another interpretation that explicates the text. This requirement does not rule out interpretations that invoke the broad intent, purposes, or structures of the Constitution. Nor

does it mean that the interpretation must seem antecedently plausible to constitutional lawyers or historians. (ii) The interpretation must be *available.* This means that it has been or would be offered in deciding cases under the Constitution. The "would be offered" clause must be included to accommodate rules or decisions that can be derived from the Constitution, but which have not in fact been derived because the issues they concern have not arisen. The implications of the text cannot be restricted to those that have actually been drawn. (iii) The interpretation must be *authoritative*: it must have been offered or acquiesced in, or would be if the occasion arose, by Congress, the President, or the courts. (iv) The interpretation must be *firm,* that is, unlikely to be overturned by the Supreme Court. These four conditions do not, of course, provide a mechanical procedure or litmus paper test for constitution-identity; plainly there will be borderline cases. Yet these conditions do afford a workable reconstruction of our intuitions about when something is or is not part of our constitutional law. And they fail to yield a definite answer at the very points where our intuitions are uncertain.

This account of constitution-identity may be usefully contrasted with those of the institutional and historical approaches. For Llewellyn the touchstone of constitutionality was the fundamentality of those patterns of behavior involved in governing. Yet, as argued earlier, this criterion in some respects includes too little (for example, it omits the plainly nonfundamental prohibition of titles of nobility) and in others too much (for example, it includes conference committees). The test suggested here sorts these and other cases properly. There is a *constitutional* bar to titles of nobility just because such a prohibition can be found in the text[108] and is available, authoritative, and firm. Very different is the case of conference committees, which lack any connection to the text and probably do not satisfy the other three conditions either. Thus our criterion enables us to understand more deeply why a formal amendment would not be an appropriate way to dismantle the institution of conference committees.

More instructive still is comparison with the historical approach. That approach would probably agree with our basic contention, as initially stated, and with the specific condition that if an interpretation is to yield a constitutional rule or decision, it must be text-focused. But it might find the other three conditions unnecessary, and substitute for them the requirement that the interpretation be *correct* in terms of actually following from the words and intent of the framers. Thus, according to this theory our true constitutional law is only a subset of the "constitutional law" that the courts and other authoritative interpreters have produced. The theory may indeed concede that it is often difficult to know exactly which interpretations are incorrect. But it would nevertheless insist that authoritative decisions may be mistaken, and hence that not all interpretations that are available, authori-

108. U.S. CONST. art. I, § 9, cl. 8.

tative, and firm are part of our constitutional law—even if the mistakes are never acknowledged and the decisions never overturned.

Our account, in contrast, holds that although Supreme Court decisions can be diagnosed as mistaken or unfounded, they are not deprived of constitutional standing unless recognition that they are mistaken or unfounded causes them to be overturned or makes overturning likely. This view reflects more accurately our constitutional practices and our intuitions about them. It somewhat resembles, to be sure, the popular view that the Constitution is what the Supreme Court says it is, but differs in several particulars. One difference is that it is not only the Supreme Court that can say what the Constitution is. There are other authoritative interpreters and their decisions often stick. Indeed, the Court may be unable to reject an interpretation with which it disagrees if that interpretation is not properly presented for review or if a particular case involving that interpretation falls within a limiting doctrine such as the political question doctrine. In other cases, the Court may acquiesce in one interpretation even though it would have preferred another.

A second difference from the historical approach is in our emphasis that finality does not imply infallibility; the power of authoritative interpreters to settle what the law is does not mean that their decisions cannot, in various ways, be properly criticized as mistaken.[109] Suppose, for example, that in concluding that a decision should turn on the intent of the framers, the Court misreads the historical evidence and reaches a conclusion contrary to the one that evidence dictates. One could say that the decision and opinion are mistaken, but saying so would have no legal consequences unless recognized by one or more of the authoritative interpreters. Again, suppose that the Court intends to let a case concerning an allegedly cruel punishment turn on contemporary American standards about what is cruel, but is unsuccessful in giving an accurate description of those standards. Here its interpretation of "cruel" could be criticized as mistaken in reference to the standard of argument that is advanced. As a final example, suppose that the Supreme Court makes an obviously important decision in a case of first impression. The decision is on constitutional grounds, but the arguments tying the decision to the text or precedent are so feeble that they are exploded by commentators. Suppose further that the Court's decision is unanimous and unlikely to be overruled, and that a vocal minority hail it as a vindication of their rights. In this situation, which some constitutional lawyers might claim is parallel to the abortion cases, the conditions of our analysis are satisfied. The interpretation, though not antecedently plausible, is still an interpretation of the text and later decisions interpreting the text; it is also available, authoritative, and firm. The criticisms of commentators may show that the decision was mistaken—even, perhaps, if they do not assume the

109. *See* H.L.A. HART, *supra* note 27, at 138-44.

correctness of the historical approach to interpretation—and yet the decision stands as part of our constitutional law.

4. *Normative Issues.*

a. *Guidance for Change: The Functions of the Constitution.* This final section takes up the normative issue of when constitutional change through interpretation is desirable. Insight into this issue can be gained by examining some of the functions of our constitutional practices.[110] The strategy will be first to identify these functions by reflecting on the nature of our Constitution, and then to attempt to show how these functions can be performed by the sorts of constitutional change available to authoritative interpreters. The object of the inquiry is not to develop a complete normative theory for generating results in actual cases, but to show how the character of our Constitution sets the structural boundaries for constitutional argument, interpretation, and change.[111]

By establishing a structure of government through the granting of powers and responsibilities and through the enumeration of basic political principles and civil rights, the Constitution discharges, among others, the following functions: It serves as an educational device, as an authoritative source of political principles, as a means of both restraining and providing for changes in basic norms, and—because of the wide knowledge and acceptance of its principles—as a means of influencing and legitimating the text-based institutional practice that has evolved. A salient feature of this practice is of course judicial review. It would be stretching matters to say that without it our constitutional norms would be merely educational and hortatory. Still, the availability of judicial review undeniably makes those norms substantially more important in the scheme of government.

Specially pertinent to our inquiry are the twin functions of restraining and providing for change. The Constitution has, through its general influence and its application in judicial review, restrained many changes that are contrary to the basic norms and structures it specifies. For instance, certain laws have not been proposed or passed, and others ruled invalid, because they run counter to the Constitution. Again, the fact that our constitutional norms are entrenched has made it more likely that formal amendments will be carefully considered and ensured that such formal amendments as are

110. By a "function" we mean something these practices are designed or specifically fitted to do.

111. It should be noted that our primary concern is not to defend judicial activism or judicial review. To focus exclusively on judicial activism and review in discussing innovative interpretations is to fall prey to the popular fallacy that associates the Constitution exclusively with the courts. As was seen in the discussion of congressional and executive interpretations, judicial activism and review pertain to only one of the ways in which interpretations alter the Constitution. Many of the interpretations that licensed, say, the growth of federal power far beyond anything anticipated by the framers, were not the work of the Supreme Court. It did not make those interpretations—it merely tolerated them. Here complaints about the undemocratic character of the Court are irrelevant, since it was not the Court but rather a more representative agency that was doing the interpreting. The courts can decline to interpret the Constitution by declining to decide a case, but the necessity of acting will often make this option unavailable to the other branches of government.

made will have strong backing. Furthermore, constitutional change through congressional and presidential interpretations has been restrained by the possibility of adverse reaction by the other branch or on judicial review. Lastly, judicially inspired changes have been inhibited by factors such as the textual focus, the role of precedent, the publication of opinions, and a tradition of judicial self-restraint. The restricting and ordering of change in these ways serves the important goals of retaining overall stability in the structure of government, preserving the ability of citizens to anticipate the legal consequences of their actions, and limiting official capriciousness as required by rule of law.[112]

Yet the Constitution also provides for change. It does so most conspicuously by the formal amendment process. The provision of authoritative interpreters, though, has a similar effect. Indeed, wherever diverse issues must be settled over time by reference to a preferred set of norms by political institutions that often find themselves in disagreement, development in the content of those norms is inevitable. In our view such development is also desirable. Problems, goals, and circumstances change. Thus it is vital that constitutional norms be extended and adapted to them. Providing for change also recognizes the fallibility of those who wrote the Constitution. Although a fixed standard of argument is provided by taking the words and intentions of the framers as relevant, those who originally wrote and ratified the Constitution cannot, in general, be claimed wiser or more representative of current popular wishes than those who would now modify their handiwork —particularly if these are elected officials such as congressmen or the President. What the framers wrote is accepted because it seems wise and because the system they founded works well, but their policy choices cannot and should not be immune to change.

There is, plainly, tension between restraining and providing for constitutional change. Our system has emphasized the former. The framers established an arduous process of formal amendment and did not require periodic mandatory constitutional conventions. As a result, constitutional norms are not subject to regular reconsideration and approval.[113] Moreover, subsequent institutional practice has reinforced the entrenched status of constitutional norms. The formal amendment process has been used infrequently and largely for minor matters. By its failure to propose frequent formal amendments, Congress, the initiator of the formal amendment process, has in effect decided that the development of constitutional law should occur mainly through authoritative interpretations—including its own. The net result, then, is that such interpretations have served and been accepted as a vehicle for bringing an old document to grips with changes in vast areas of social life. Thus, the tension between restraining and providing for change

112. On the rule of law, with special reference to uncertainty and the diminution of liberty, see F. HAYEK, THE ROAD TO SERFDOM 72-87 (1944); J. RAWLS, *supra* note 44, at 235-43.

113. Indeed, the alternative of a nonmandatory constitutional convention, allowed by U.S. CONST. art. V, has never been used.

has in our system been resolved, though incompletely, by ensuring that when constitutional change occurs, it is in small steps and on the basis of careful consideration. This is evident not only in the arduousness of the formal amendment process, but also in the fact that change through interpretation is generally made by or subject to the approval of an elite group of judges who are insulated from many political pressures and who must publish reasons for their decisions.

b. *Recommendations and Justifications.* Having identified some of the functions of our Constitution, we present some normative propositions invoking them. The task is to show how those functions justify important features of our constitutional practice relating to the textual focus and innovation. Although our treatment is schematic and our arguments are far short of demonstrative, the discussion that follows indicates how the character of constitutional argument, interpretation, and change is shaped by a constitutional system that serves these functions.

The first of our normative claims concerns the textual focus: in opposition to Llewellyn, we think it a good idea to preserve a central role for discussions of the meaning of the text and its prior interpretations. The restraint of contraconstitutional change and increasing the chance that such change as does occur will be well-considered are among the functions discharged by the textual focus. A jurisprudence that proceeds by interpreting the meaning of a text is likely to foster continuity and stability that might otherwise be lacking. When combined with the case or controversy requirement, the textual focus helps insure that change will be incremental and intelligible, thus promoting the security of expectations and the rule of law. Underlying these points is the fact that recognizing and adhering to the textual focus enables us to have a shared standard of argument. This is not to say that every principle appealed to in constitutional argument is, or should be, one found in the Constitution. The idea is rather that many principles will be found there and that they will be among those invoked in the process of interpreting the text and prior opinions based on it.[114]

Our second normative contention is that interaction and cooperation among the branches of government in developing the content of the Constitution should receive more emphasis both in our constitutional theories and in our practice. A process involving different agencies with different competencies and perspectives seems most likely to minimize hasty, ill-considered change. Though the fractionalization of power (checks and balances) is often emphasized in this context, governmental agencies must perform functions of *coordination* as well as *control* if the basic patterns of

114. Our theory differs, in two ways, from Dworkin's in respect to the nature of constitutional argument. In our view, historical meaning is always relevant, whereas in Dworkin's, it is not insofar as it bears on *conceptions*; hence historical arguments would loom larger in our scheme. In addition, while in Dworkin's view historical meaning insofar as it bears on *concepts* is not within the province of judges to change, in ours it will sometimes be proper to invoke the reauthoring model and do just that.

government and divisions of authority are to be preserved and adjusted to changing circumstances.[115] As to the first of these functions, note that technical competence and access to information will vary, from one issue to another, among different branches. Accordingly, each branch must take the decisions of other branches honestly into account by considering, among other things, the perspectives and reasoning that led to them. Coordination may also mean that one branch defers to the contrary judgment of another. Deference is often urged for judges, but where other branches are less well equipped to examine the constitutional issues, it also applies to them. Generalization about when deference is desirable is very hazardous, and it is therefore essential to distinguish various sorts of deference. Perhaps the argument for judicial deference is strongest in so-called "silence of Congress" cases, where a power assigned to Congress may be exercised by the states until Congress acts.[116] However, even in this area the wisdom of some decisions is dubious.[117] It seems, in any event, unwarranted to extend this very strong form of acquiescence to a much larger share of the Supreme Court's business, for doing so will at times disrupt the federal scheme.[118] Perhaps the argument for executive and legislative deference is strongest when the Court is performing its role of protecting the general structure of government and the rights of unpopular and unrepresented minorities.

Nevertheless, often one agency is not persuaded that it should defer to the other's claim of superior competence, and so the function of control or checking comes into play. When that happens, conflict is one possibility, for sometimes the institutional roles of different branches fairly compel them to resist. As an illustration, in much of the legislation directed against Communists and "subversives" after World War II, Congress was so responsive to, and partly the cause of, ill-reasoned public opinion that it was a poor

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115. These respective functions of coordination and control are illuminatingly discussed in M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 329-36 (1967).

116. The term is from Biklé, *The Silence of Congress,* 41 HARV. L. REV. 200 (1927). For a recent discussion of "silence of Congress" cases and an attempt to frame and justify a concept of "tentative" judicial review based on such cases, see L. LUSKY, BY WHAT RIGHT? 47-50, 56, 365-66 (1975).

117. For instance, in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), the Court upheld a Sherman Act indictment of an insurance company doing business across state lines. It did so on the footing that interstate insurance is "commerce" under the meaning of the commerce clause and hence is regulable by Congress. The next year Congress responded with the McCarran Act, which declared that continued regulation and taxation by the states of interstate insurance is in the public interest and that congressional silence is no barrier to state authority. Act of March 9, 1945, ch. 20, 59 Stat. 33 (codified at 15 U.S.C. §§ 1011-15 (1970)). The validity of that act came before the Court in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). A South Carolina statute imposed a three per cent tax on insurance premiums received by out-of-state corporations on business done within the state, though no similar tax was imposed on South Carolina corporations. The Court upheld the tax on the ground that, while a state tax might be invalid under the commerce clause in the absence of action by Congress, it may be validated by congressional action consenting to it—which is what the Court understood the McCarran Act to have done. In our view, it was a mistake for the Court to display such extreme deference that a state statute involving discrimination on its face could survive constitutional attack.

118. Such a course of "tentative" judicial review is advocated in L. LUSKY, *supra* note 116, at 47-50, 56-58, 365-66, and criticized in Munzer, Book Review, 18 WM. & MARY L. REV. 461, 465-67 (1976).

guardian of political rights. The Supreme Court was somewhat better insulated against political pressure and in a few cases, such as *United States v. Lovett*,[119] protected those rights, sometimes by innovative interpretations.

The third part of our normative position involves the claims that original understandings are not always determinative of what a constitutional provision means now, that historical arguments should not always be taken to be conclusive, that independent policy considerations should be taken into account, and that innovation through authoritative interpretations is sometimes desirable. Judges and other authoritative interpreters must play their roles in developing the meaning of the Constitution. This is a consequence of the facts that the formal amendment process is so difficult and that Congress and the people have chosen to use it so infrequently for significant matters. If current decisions were based entirely on principles found in the original content of the Constitution, they would hardly be well-considered, our country has changed in too many important ways for the specific intentions of the framers to be an adequate source of guidance. Our endorsement of development of the Constitution through interpretation does not, however, imply that we hold that formal amendment is unnecessary[120] or that it has been sufficiently used. Our Constitution contains, for example, no economic and social rights of the sorts common in twentieth century constitutions,[121] and it is difficult to introduce such rights by interpretation. Furthermore, some sections of our Constitution are directed to eighteenth rather than twentieth century concerns and could well be deleted. Thus, carefully considered formal amendments continue to be needed and should play an ongoing role in the evolution of our Constitution. Those who are troubled by constitutional development through interpretation have special reason to attempt to make the amendment process easier and more frequently used, for that is the only effective alternative to the practices that now prevail.

A final normative issue is when, if ever, judges should innovate in a way sufficiently contrary to the existing content to require the reauthoring model for its explanation. The functions relevant to answering this question pertain to providing for needed and well-considered change and to preserving constitutional legitimacy. If constitutional change is believed necessary on the basis of careful consideration and extensive argumentation, and if an authoritative interpreter has good grounds for believing that the change will not be introduced through formal amendment, innovation of this radical sort may then be desirable. The preservation of popular belief

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119. 328 U.S. 303 (1946). *See also* Yates v. United States, 354 U.S. 298 (1957).

120. There are probably some constitutional changes that can be made only through formal amendment. As a possible illustration, suppose that a strong case can be made for having a single term of six years for the presidency. However desirable this change might be, it cannot be introduced, in circumstances that are at all plausible to envision, as a matter of interpretation. Canonical language has been used which effectively rules out modifications through interpretation in the length and number of terms. *See* U.S. CONST. art. II, § 1, cl. 1; amend. XXII, § 1.

121. *See, e.g.*, the constitutions of India and Venezuela in BASIC DOCUMENTS ON HUMAN RIGHTS 42-45, 77-84 (I. Brownlie ed. 1971).

in the legitimacy of constitutional norms may, in circumstances where the existing meaning dictates an indefensible decision, make it essential to make a significant break with the established meaning of the clause. For example, suppose that the original meaning of the contract clause together with such developments as lay within its growth pattern would not have countenanced nonfulfillment of mortgage contracts even in the most extreme of economic emergencies. It might then be necessary to reauthor the provision to avoid disastrous consequences of the sort that threatened during the Great Depression. If so, the radically innovative step of holding certain deferments of foreclosure rights not to impair the obligation of contracts would be rationally defensible and politically feasible.[122] Thus, unless change by formal amendment is required by the strictness of the language in question, reauthoring will be in order when a sound result can be reached in no other way.

122. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).